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NO. 529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

LOFFLAND BROTHERS COMPANY
and
THE TRAVELERS INSURANCE COMPANY,
Petitioners

v.

WILLIE J. TEICHMAN and
C. D. CALBECK, DEPUTY COMMISSIONER
and the
UNITED STATES OF AMERICA, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Judges Of Said Court:

Loffland Brothers Company and The Travelers Insurance Company, Petitioners, file this their Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit wherein Willie J. Teichman, and C. D. Calbeck, Deputy Commissioner, and United States of America are Respondents.

I.

OPINIONS OF THE COURTS BELOW

The award of the Deputy Commissioner and the memorandum opinion of the District Court were not reported and are contained in the appendix. The opinion of the Court of Appeals for the Fifth Circuit is not yet reported; it is also contained in the appendix.

II.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered August 16, 1961.

The order denying rehearing was entered by the Court of Appeals on September 15, 1961.

Jurisdiction of this Court is present under Rule 19, Section 1(b) of Rules of the Supreme Court of the United States and Title 28 U.S.C.A., par. 1254(1).

III.

QUESTIONS PRESENTED

1. Whether the jury verdict in employee's Jones Act case that "the plaintiff did not receive such injury" effected an estoppel by judgment in a subsequent proceeding before the Deputy Commissioner under the Longshoremen's and Harbor Worker's Compensation Act involving the same injury and the same disability.

2. Whether the Deputy Commissioner under the Longshoremen's Act can base an award upon an occurrence which followed the injury sustained by employee, contrary to the uncontradicted testimony of the employee that the injury proceeded such occurrence, and thereby avoid the bar of estoppel by judgment.

3. Whether an employee after proceeding to judgment as a seaman under the Jones Act and receiving the benefits of a trial by jury and unlimited liability was estopped from taking the inconsistent and contradictory position that he was not a seaman in later proceedings under the Longshoremen's Act.

4. Whether an employee has elected his remedy barring a recovery under the Longshoremen's Act when he previously sought recovery under the Jones Act alleging and proving that he was a seaman and had pursued his remedy to judgment.

IV.

STATUTES INVOLVED

Title 33, U.S.C.A., par. 902 (2) (3)—Definitions:

"When used in this chapter— . . .

"(2), the term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

"(3), the term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

Title 33, U.S.C.A., par. 903(a)(1)—Coverage:

"(a), Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any Drydock) and if re-

covery for the disability or death through Workmen's Compensation proceedings may not validly be provided by state law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net;"

Title 33, U.S.C.A., par. 905, Exclusiveness of Liability:

"The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next to kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action, the defendant may not plead as an defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

V.

STATEMENT OF THE CASE

1. *Summary of the Facts:*

Respondent-claimant Willie J. Teichman initially filed suit under the Jones Act against his employer, petitioner

Loffland Brothers Company, in the same District Court below, which case was defended by petitioner The Travelers Insurance Company as liability insurance carrier. In that action claimant alleged two incidents caused his injury and his damages: the "first incident" occurring when he jumped from a crew boat to an LST; the "second incident" occurring a few hours later the same day when because of his disabled condition claimant was being transferred from the LST back to the crew boat by a crane and basket, he was "bumped" on the deck of the crew boat. Claimant alleged he was a seaman, that he "elected" to proceed under the Jones Act against his employer, and that employer was negligent in connection with both incidents causing disability to his back. Prior to the trial of that cause plaintiff's pleadings were amended to assert only the "first incident" as the cause of his disability and damages, deleting the reference to the "second incident".

In both the Jones Act case trial and in the trial of his Longshoremen's Act claim, Teichman testified that he was injured by the "first incident" and became seriously disabled immediately thereafter, and hours later the same day, because of his disability and being unable to climb down the steel ladder to the crew boat, he was transferred by means of a basket attached to a crane to the crew boat.

The uncontroverted evidence throughout the trial of the Jones Act case was that claimant was suffering from disability to his back which was diagnosed as a ruptured disc and terminated in an operation to his back. Defendant employer did not contend that claimant was not suffering from a back condition, but employer's defense and the crucial controversy which was evident throughout the trial in that case was that claimant's back condition and his disability were solely the result of a pre-existing back con-

dition caused by three prior back injuries and the natural deterioration of his back condition.

The jury question submitted was, "Did the plaintiff Willie J. Teichman receive an injury on January 1, 1956, as he was boarding the vessel 'Stanolind 50'?" which was answered, "The plaintiff did not receive such injury." The real controversy submitted was whether claimant's back condition and disability was proximately caused by the "first incident" or solely caused by the three prior back injuries, to which the jury answered by necessary inference, that it was solely caused by the three prior back injuries.

Following entry of judgment for the employer, Loffland Brothers Company, Teichman reasserted his claim under the Longshoremen's Act, taking the position that he was not a seaman but a harbor worker within the meaning of that Act and sought recovery for the same condition as a harbor worker.

In spite of claimant's own admissions, his claim of injury from the jumping incident, and his uncontroverted testimony that he was seriously injured by the "first incident" resulting in immediate acute pain and incapacity and that the "second incident" was a jarring that occurred while being transported from one boat to another in the basket while he was already in an incapacitated state, the Deputy Commissioner found that the second minor incident was the injury and the producing cause of total disability, that the prior back condition was not disabling, and that the "first incident" did not constitute an injury.

On appeal the same district judge who tried the Jones Act case ruled that claimant was precluded by estoppel from recovery under the Longshoremen's Act and granted an injunction against enforcement of the award. The Court of Appeals for the Fifth Circuit reversed and remanded.

It is from this action of the Court of Appeals that petitioner appeals.

2. *Estoppel by Judgment:*

Your petitioners believe that there was an estoppel by judgment which precluded an award for Teichman. Respondents have a ready answer for this contention—there were two injuries; thus, a trial involving only the first injury cannot bar recovery on the second.

But pushing aside the veil of this simple answer to examine closer, we come to a novel question of first impression: Where Teichman testified that he sustained a serious and disabling injury while jumping to the LST and was immediately seriously and painfully incapacitated and hours later while being transferred from the LST in a basket enroute to medical treatment, he was bumped on the deck causing momentary pain to his previously hurt back, can the bumping incident be *the injury* under the Longshoremen's Act ignoring the jumping incident? Can the Deputy Commissioner avoid the bar of estoppel by circumventing the principal injury testified to by the claimant?

The testimony of Teichman is summarized in the appendix of appellees' brief below and is a part of the transcript filed herewith.

Significantly, both incidents were reported as a single claim for compensation under the Longshoremen's Act. Under the evidence of either trial, either the jumping incident caused an injury made the basis of Teichman's claim, or his incapacity was a reoccurrence of years of trouble with a back condition initiated by three prior back injuries for which he had received considerable previous medical treatment.

The inescapable conclusion from Teichman's testimony was that *there was only one injury which was initiated and had its point of origin in the jumping incident.* The second incident was admittedly only incidental and secondary to the injury from the jumping incident. Unless the first incident resulted in injury, there could be no significance to the bumping incident, no reason for causing pain, no re-injury. There could only have been one injury causing the disability complained of, or no injury at all.

For the purpose of illustration, suppose that following the jumping incident Teichman was pulled up to the deck by another employee causing pain in his back, that while swinging his legs over the rail his back pained him again, and when he reclined on his bunk a short time later, he again felt pain. Could Teichman then claim and recover for separate injury from each of these incidents? If he failed to recover for the initial incident, could he recover for one of the other incidents when the injury actually occurred at the time of jumping to the ship. Obviously, the succeeding incidents were incidents of pain and discomfort involving one injury—not a series of injuries. We do not believe that a single injury can be subdivided to accomplish a result. Therefore, estoppel by judgment is applicable since the injury in both actions was identical.

Looking further into the matter we find a second question of first impression: Was the *cause* of Teichman's incapacity judicially determined by the jury verdict in the Jones Act trial barring a second adjudication of the cause of his incapacity? Aside from the question of whether there was one injury or two, there was only one incapacity, the same disability, before both the jury and Deputy Commissioner, and a determination of the cause of that disability was necessarily made by the jury since the evidence

was uncontroverted that Teichman had suffered a worsened back condition on the day of his alleged injury and thereafter.

The crucial fact issue before the jury in the Jones Act trial was what the producing cause of claimant's disability was. The jury had before it only two possibilities: (1) that the disability was produced or caused by the jumping incident or (2) that the disability was produced and caused solely by a natural deterioration from the three prior back injuries sustained by Teichman. Since the burden of proof was on Teichman the question asked was whether he sustained an injury in connection with the jumping incident or, in other words, whether plaintiff's disability resulted from the incident. If it had been procedurally proper to ask the jury the converse question representing employer's position, the inquiry would have been, "Was plaintiff's disability solely the result of his prior back condition?"

The rule of estoppel by judgment has been stated,

> " . . . it (judgment) operates as an estoppel irrespective of whether the second suit is based upon the same claim or demand or not and the effect of its operation as such is to inhibit a re-examination in the second suit of any matter that was necessarily determined by it. In other words, a judgment which is not a bar to a second suit because the claim or demand is different may nevertheless operate to prevent a relitigation therein of any issue that it necessarily adjudicated."

26 *Tex. Jur.* 179, Judgments, par. 437; *Commissioner v. Joseph Sunnen*, 33 U.S. 591; *National Lead Company v. Mulson*, 131 F. 2d 51; *Baton v. Gulf Oil Corporation*, 235 S.W. 2d 491; 30 *Am. Jur.* 928, Judgments, par. 183.

The Texas Supreme Court in *Houston Terminal Land Company v. Westergreen*, 27 S.W. 2d 526, elaborated further:

> "Where an issue of fact is made in a suit which becomes necessary to and upon which determination of the issues in that suit turned and rested, upon establishment thereof by evidence in a subsequent suit between the same parties upon a different cause of action, such determination of the issue and the judgment based thereon in such former suit creates an estoppel by judgment against the determination again of the self same.
>
> " . . . if a judgment necessarily pre-supposes certain premises they are conclusive as the judgment itself. Reasons for the rule are that a judgment is an adjudication on all the matters which are essential to support it, and every proposition assumed or decided by the Court leading up to the final conclusion and upon which such such conclusion is based is as effectually passed upon as the ultimate question which is finally solved."

Applying the law we must determine as to the issue of "what the producing cause of claimant's disability was," whether: (1) This was an issue of fact "necessary" to and upon which determination an ultimate issue in the suit turned upon. (Since one of the ultimate issues was "whether the jumping incident caused an injury to the plaintiff," the answer must be in the affirmative.) (2) The issue of fact was a "necessary issue to support an ultimate issue in the proceedings under the Longshoremen's Act or was an ultimate issue in those proceedings. (Again, we must answer in the affirmative since if the disability resulted solely from the three prior back injuries, it could

not have resulted from either incident which claimant contends occurred on January 1, 1956.)

The only remaining question would be whether a determination by the jury "that plaintiff's disability was produced by three prior back injuries" was "necessarily" a determination that the three prior back injuries were the *sole* producing cause. Since the jury found that claimant sustained no injury, this effectively precluded an argument that he was partially injured, and since the only alternative was the three prior back injuries and a natural deterioration from those injuries, the jury's finding was that the prior injuries were the sole producing cause.

2. *Inconsistent Positions as an Estoppel:*

We reach the third question before the Court, whether an employee after proceeding to judgment as a seaman under the Jones Act and receiving the benefits of a trial by jury and unlimited liability is estopped from taking the inconsistent and contradictory position that he was not a seaman in later proceedings under the Longshoremen's Act.

In the District Court's memorandum opinion, the Court said:

> "As a seaman, the claimant brought his employer into this Court to answer his Jones Act cause of action. He received the benefits of that statute; namely a trial to a jury of the question whether he received an injury proximately caused by the employer's negligence, and without a statutory ceiling placed upon his recovery is such proof to be the case. He failed to recover, not because of the judicial determination that he was not a seaman, but because he did not prove his case. Having thus availed himself of the

> benefits of the Act, and having subjected the employer the defense of such action, he may not now disregard the judgment of the Court and proceed anew on a completely inconsistent theory." (Page 7).

This rule of estoppel may be simply stated that a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or successive series of suits. *Scarano v. Central R. Company*, 203 F. 2d 510; II—*Freeman on Judgments*, par. 631 (5th Ed. 1925); 31 C. J. S., Estoppel, pars. 120, 121. The prohibition applies to Teichman's claim under the Longshoremen's Act.

3. *Election of Remedies:*

Upon the last question before the Court concerning whether the employee has elected his remedy barring a recovery under the Longshoremen's Act when he has previously sought recovery against his employer under the Jones Act alleging and proving that he was a seaman and has pursued his remedy to judgment; paragraph V of Teichman's First Amended Petition (his trial petition in the Jones Act case) alleged specifically that he elected to maintain his action for damages at law under the Jones Act. A party who has two or more inconsistent co-existing remedies which arise out of the same facts and he pursues one remedy with knowledge of the facts to judgment, he cannot later pursue the alternate remedy. It is not necessary that there be a showing of any material disadvantage to an adversary by virtue of the election. *Myers v. Ross*, 10 F. Supp. 409; 28 C. J. S., Election of Remedies, pars. 14, 26.

The elements of the doctrine are: (1) two or more remedies must actually be available; (2) the remedies must

be inconsistent; (3) the electing party must have knowledge of facts making other remedies available; (4) there must be some decisive Act whereby a choice is made. 28 C. J. S., Election of Remedies, par. 11.

The doctrine has been enunciated and applied in the following cases: *Robb v. Voss*, 155 U.S. 13, 39 L. Ed. 52; *United States v. Oregan Lbr. Co.*, 260 U.S. 290, 67 L. Ed. 261; *Dahn v. Davis*, 258 U.S. 421, 66 L. Ed. 696; *Militano v. United States*, 165 F. 2d 599; *Parr v. United States*, 172 F. 2d 462; *United States v. Marino*, 155 F. 2d 456; *Brown & Root, Inc. v. United States*, 92 F. Supp. 257; *Banner Manufacturing Co. v. United States*, 112 F. Supp. 365; *Inland Waterways Corp. v. Doyle*, 204 F. 2d 874; *Continental Grain Co. v. First National Bank of Memphis*, 162 F. Supp. 814; *Michel v. Louisville & N.R. Co.*, 188 F. 2d 224.

Since each of the criteria has been met by the facts of this case, Teichman was estopped to assert his inconsistent remedy under the Longshoremen's Act.

VI.

REASONS FOR GRANTING THE WRIT

While the authority of these fundamental doctrines cannot be challenged, their application in the field of multiple remedies now available to the maritime worker needs clarification. There has been very little light thrown on this subject.

Is the only limitation upon the right of recovery of a maritime worker for personal injuries a full recovery? Is there a limit to the number and type of inconsistent claims he may assert? The answers to these questions are con-

cerning all employers of maritime workers and their insurers.

The recent expansion of the horizons of maritime employers liability should be defined from the standpoint of the limitation imposed by the doctrines of estoppel as they affect these multiple alternate remedies.

The petitioners believe that the Court of Appeals for the Fifth Circuit was in error in failing to apply these doctrines to this case and that the erroneous view should not stand as the only word on this important subject.

WHEREFORE, your petitioners pray this Honorable Court to grant the Writ of Certiorari.

Respectfully submitted,

BRYAN F. WILLIAMS, JR.

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CERTIFICATE OF SERVICE

A correct copy of the foregoing Petition for Writ of Certiorari was mailed on this_____day of October, 1961, to Respondent Willie J. Teichman's Attorney of Record, Mr. Herman Wright, Mandell & Wright, South Coast Building, Houston 2, Texas, and to attorneys for Respondents C. D. Calbeck and the United States of America, Mr. Woodrow P. Seals, United States Attorney, Post Office Building, Houston 2, Texas, Mr. David L. Rose, Attorney, Department of Justice, Washington 25, D. C., and the Solicitor General, Department of Justice, Washington 25, D. C.

_____

Jerry D. Barker

Subscribed and Sworn to by Jerry D. Barker before me, the undersigned authority, this the_____day of October, 1961.

_____

Notary Public in and for
Galveston County, Texas.

APPENDIX

Compensation Order and Award of Compensation

United States Department of Labor, Bureau of Employees' Compensation, Eighth Compensation District

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Compensation Order Award of Compensation
Case No. OCS—1405-5

In the Matter of the Claim for Compensation Under the Outer Continental Shelf Lands Act (Public Law No. 212)

Willie J. Teichman, claimant
Loffland Brothers Company, employer
The Travelers Insurance Company, insurance carrier

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and hearings having been held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

On January 1, 1956, the claimant above named was in the employ of the employer above named, on the employer's rig No. 79, in Block No. 144 of the Galveston Area, in the Outer Continental Shelf Area, in the Gulf of Mexico, approximately 18 miles east off Galveston County, of the State of Texas, in the Eighth Compensation District, established under the provisions of the Act approved August 7, 1953 (Public Law No. 212). The liability of the employer for compensation under said Act was insured by The Travelers Insurance Company. At the said time and place the employer was performing work in

connection with the exploring for natural resources (oil) of the subsoil and seabed of the Outer Continental Shelf.

On the said day the claimant herein, while performing service as a floorman for employer, sustained personal injury resulting in disability. Two events were described as having occurred on said day, either of which could have produced bodily injury. First, the claimant jumped from the tug, *Stanolind 20*, to the drilling rig, *Stanolind 50*, and thereafter he felt pain in his back. As to this first event, in Civil Action No. 2267, U. S. District Court, Southern District of Texas, a jury found that no injury was sustained by the claimant. Second, the claimant was being transferred from the drilling rig, *Stanolind 50*, by means of a heavy metal basket attached to a line on a crane, to the tug, *Stanolind 20*. The basket came into contact with the deck of the tug with considerable force, and thereupon the claimant felt pain in his back. No injury was sustained by the claimant as the result of the first event. It is therefore inescapable, and I find that as a consequence of the second event, claimant sustained an injury and ruptured intervertebral disc between fourth and fifth lumbar vertebrae for which he was operated on during June 1957, when a laminectomy was performed and a spinal fusion was done. A second exploratory operation was performed on April 3, 1958, in order to find the cause of continuing pain in the claimant's left leg. The claimant developed an anxiety reaction as a result of this injury.

* * * * *

Written notice of injury was not given to the employer within thirty days, but the employer had knowledge of the injury and has not been prejudiced by the lack of

such written notice. As a result of the injury the claimant required medical treatment and care, some of which was rendered by physicians designated by the employer and the insurance carrier and some by physicians chosen by the claimant. The employer and the insurance carrier are liable for the reasonable cost of all medical treatment and incidentals. The reasonable cost of such continuing medical treatment and incidentals is found to be as follows:

Dr. Robert E. Casey	$ 750.00
Galveston County Memorial Hospital	965.50
Danforth Memorial Hospital	591.00
Dr. Robert Green	200.00
Dr. E. Peter Garber	50.00
Total	$2,556.50

The average weekly wage of the claimant at the time of injury was $103.04. He was paid full wages for day of injury.

As a result of the injury the claimant was wholly disabled from January 2, 1956, to the present time and continuing, and for such temporary total disability the claimant is entitled to compensation at $35.00 per week.

Accrued compensation for temporary total disability to include July 19, 1959, amounts to $6,475.00. The employer and the insurance carrier have paid $665.00 to the claimant as compensation.

Upon the foregoing findings of fact the Deputy Commissioner makes the following

Award

The employer, the Loffland Brothers Company, and the insurance carrier, The Travelers Insurance Company, shall

pay compensation to the claimant as follows: For temporary total disability from January 2, 1956, to July 19, 1959, inclusive, 185 weeks at $35.00 per week, $6,475.00.

The employer and the insurance carrier having paid $665.00 to the claimant as compensation shall pay forthwith $5,810.00; and subsequent to July 19, 1959, they shall continue to pay the claimant biweekly installments of compensation at $35.00 per week subject to the limitations of the Act or until further order of the Deputy Commissioner.

The employer and the insurance carrier are liable for the medical expense rendered by Dr. Robert E. Casey, $750.00; Dr. Robert Green, $200.00; Dr. E. Porter Barber, $50.00; Galveston County Memorial Hospital, $965.00; and Danforth Memorial Hospital, $591.00.

The employer and the insurance carrier shall continue to furnish the claimant with such medical treatment and care as the nature of the injury and the process of recovery therefrom may require.

An attorney's fee of $1,624.73 is approved in favor of Mandell & Wright, Attorneys, for services rendered on behalf of the claimant ($124.73 of which is for consultation and testimony of Dr. Robert E. Casey, telephone and telegraph charges, and for cost of photostats of medical evidence), such sum to be a lien upon and be paid out of this award.

Given under my hand at Galveston, Texas, this 20th day of July, 1959.

C. D. Calbeck,

C. D. CALBECK,

Deputy Commissioner,

Eighth Compensation District.

MEMORANDUM OPINION OF JUDGE CONNALLY

[Caption omitted]

November 22, 1960

Memorandum

This is an action to enjoin and set aside an award of the Deputy Commissioner, issued pursuant to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. § 901, et seq.). The award was in favor of the claimant Teichman, one of the defendants here, and was adverse to his employer Lotlland Brothers, the plaintiff. It presents a single controlling question of law, and arises as follows:

On January 1, 1956, the claimant Teichman was employed by Lotlland Brothers to do oil field type work upon a drilling rig located some distance offshore from Galveston, Texas, in the Gulf of Mexico. Lotlland was doing the work under contract with Stanolind Oil & Gas Company. Anchored alongside the drilling platform was a large vessel (the *Stanolind 50*, an LST), used as quarters for the drilling crews and for related purposes. A much smaller vessel, the *Stanolind 20*, was used to convey the employees from shore to the drilling site. Both vessels were owned by Stanolind.

On the date above mentioned, Teichman was carried, with other employees, by means of the *Stanolind 20* to the *Stanolind 50*, preparatory to beginning his tour of duty. He contends that he received two separate and distinct injuries as a result of accidents a few hours apart. He claims that he sustained his first injury in climbing

from the *Stanolind 20* to the *Stanolind 50*, injuring his back. Immediately thereafter, while aboard the *Stanolind 50*, he suffered great pain and was unable to work. Several hours later, he was lifted by means of a stretcher and "basket", with a line, from the deck of the *50* to the deck of the *20* for return to shore and hospitalization. He contends that the "basket" was dropped with considerable force upon the deck of the smaller vessel, whereby he received additional injuries.

In due course thereafter, Teichman filed a third party action against Stanolind, and against his employer Loffland Brothers under the Jones Act (46 U.S.C.A. 688) (C.A. 2267, Galveston Division of this Court). He alleged negligence as to each defendant, and unseaworthiness of the Stanolind vessels. By amended pleading, filed prior to trial, he abandoned his allegations of the second injury, and relied entirely on the original one. The case was tried to a jury.

Teichman's testimony on the trial was to the effect that while his primary duties were as an oil field worker, he had many duties related to the safety and security of the *Stanolind 50*. It was ample, under cases like *Gianfala v. Texas Company*, 350 U.S. 879 (1955), reversing *Texas Company v. Gianfala*, 222 F. (2) 382 (5th Cir., 1955); and *Offshore Co. v. Robison*, 266 F. (2) 769 (1959), to raise a jury question as to his status as a seaman.

Among other defenses, Loffland and Stanolind contended that Teichman was suffering from a series of earlier back injuries, and in fact had not been injured as alleged. In answer to special interrogatories under Rule 49, the jury found that Teichman had not received an injury in climbing from the smaller vessel to the larger, as he had testi-

fied; and pursuant to instructions of the Court did not answer the remaining issues inquiring as to his status as a seaman, negligence, etc. In accordance with this verdict, judgment was entered that the plaintiff take nothing. No appeal was taken, and the judgment became final.

Sometime thereafter, the present proceedings under the Longshoremen's and Harbor Workers' Compensation Act were instituted. A hearing was had before the Deputy Commissioner. There the claimant Teichman placed full emphasis on the alleged second injury (when the "basket" struck the deck of the smaller vessel), and pointed to this injury as the source of his disability. He contended further that he was not a seaman, but a maritime worker within the scope of the Compensation Act. Despite the testimony which he had given in the earlier trial before this Court and the position he had there assumed, and over the objection of the employer Loffland that under the doctrine of estoppel or res judicata he was estopped from taking this new approach, the Deputy Commissioner made an award in his favor. It was his finding that Teichman's status brought him within the coverage of the Act, and that the second injury was the source of the disability. It was to enjoin the enforcement of this award that the present action was filed.

The controlling question is whether the law will permit the claimant to assume the contradictory and inconsistent position which he now advances before the Deputy Commissioner. A second question, as to the sufficiency of the evidence to support the findings of the Deputy Commissioner must be determined in favor of the award. There was sufficient evidence to that effect, if the fact finding agency chose to disregard all the impeaching testimony (as apparently was the case).

The Jones Act and the Compensation Act were designed to afford relief against their respective employers to two different classes of employees—the Jones Act applying to "Any seaman who shall suffer personal injury in the course of his employment" (46 U.S.C.A., § 688), while the Compensation Act gives an exclusive remedy by way of compensation against the employer to any maritime employee who is not "A master or member of a crew of any vessel" (33 U.S.C.A., § 903); *Swanson v. Marra Brothers*, 328 U.S. 1 (1945); *Offshore Company v. Robison*, 266 F. (2) 769 (1959). While there may be doubt in a particular situation whether the employee falls within one category or the other, the statutes are mutually exclusive. *(South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940); *Weiss v. Central Railroad Co. of New Jersey*, 235 F. (2) 309 (1956).

As a seaman, the claimant brought his employer into this Court to answer his Jones Act cause of action. He received the benefits of that statute; namely, a trial to a jury of the question whether he received an injury proximately caused by the employer's negligence, and without a statutory ceiling placed upon his recovery if such proved to be the case. He failed to recover, not because of a judicial determination that he was not a seaman, but because he did not prove his case. Having thus availed himself of the benefits of the Act, and having subjected the employer to the defense of such action, he may not now disregard that judgment of the Court and proceed anew on a completely inconsistent theory. *(Scarano v. Central R. Co.*, 203 F. (2) 510 (1953).

The present action is to be distinguished from those where the claimant has available two remedies, and makes

his election, whereupon his receiving benefits under the one precludes his assertion of the other. (*Dahn v. Davis*, 258 U.S. 421 (1922); *Parr v. U. S.*, 172 F. (2) 462 (1940); *U. S. v. Marine*, 155 F. (2) 456 (1946).

In theory, at least, the claimant here has no election. He was either a seaman, and a member of the crew of the *Stanolind 50*, or he was not, and he was entitled either to the seaman's remedy or to that of the maritime worker. Thus, he was called upon not to elect between two available remedies, but to determine which of the two was available. On this premise, claimant argues that with the uncertainty facing him, he should not be obliged to elect, at his peril, which path to follow, and to lose all relief if he chose wrongly. He cites *Ayers v. Parker*, 15 F. Supp. 447 (1936), and *Dixie Sand and Gravel Corp. v. Holland*, 255 F. (2) 305 (1958), where, on it being held that claimant's status did not bring him within coverage of one statute, he then was permitted to pursue the other; but, such cases are distinguished by the very significant fact that here there has been no determination that claimant chose the wrong remedy. On the contrary, as a seaman he received a jury trial of his Jones Act cause of action before a court vested with jurisdiction of the parties, and, by his own allegations and testimony, of the cause of action. He is not entitled to more. Enforcement of the award of the Deputy Commissioner will be enjoined.

Clerk will notify counsel, and furnish each of them with a copy hereof. Attorneys for the plaintiffs will prepare and submit appropriate order in due course.

Done at Houston, Texas, this 22nd day of November, 1960.

(S) Ben C. Connally, *Judge.*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18844

WILLIE J. TEICHMAN and C. D. CALBECK, Deputy Commissioner, and UNITED STATES OF AMERICA,
Appellants,

versus

LOFFLAND BROTHERS COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(August 16, 1961)

Before HUTCHESON, RIVES and WISDOM, Circuit Judges.

HUTCHESON, Circuit Judge: This appeal tests for error the findings and judgment of the district court, holding that an employee was precluded from receiving an award for compensation for an injury brought under the

Longshoremen's Act because he had brought an unsuccessful suit against his employer under the Jones Act as a seaman based upon a different injury.

Appellee-employer and its insurance carrier brought this suit to enjoin, as not in accordance with law, an award to its employee, appellant Teichman, made by the appellant Deputy Commissioner Calbeck under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. District court jurisdiction was based upon 33 U.S.C. 921. The complaint alleged, inter alia, that the award was not supported by substantial evidence, and that the employee was precluded from receiving compensation because of a judgment in a prior civil action. The case was submitted below on the administrative record. The district court *found that the award was supported by substantial evidence,*[1] *but enjoined its enforcement on the*

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[1] The material facts were thus found by the Deputy Commissioner:

> The employer Lofland Brothers Company is engaged in exploration of the subsoil and seabed of the Outer Continental Shelf in the Gulf of Mexico for natural resources including oil. Appellant Teichman was employed at an average wage of $102.01 a week by Lofland Brothers as a floorman on drilling rig No. 79 approximately 18 miles east of the coast of Galveston County, Texas. He boarded a personnel carrying tug boat (the Standard 20) which took him and other workmen from shore to the drilling rig. When he jumped from the tug to the supply ship (the Standard 16) which was moored to the drilling rig he felt severe pain in his back. Several hours later, after he complained of the pain, his supervisor and the captain of the supply ship determined that he should be returned to shore. Accordingly, Teichman was placed in a heavy metal basket which was attached to a line on a crane. The basket was lifted by the crane and moved over the deck of the tug and lowered. The basket struck the deck of the tug with considerable force. As a result of this impact, Teichman sustained a ruptured intervertebral disc

ground that the employee was precluded from receiving compensation under the Longshoremen's Act because of the election he had made in the civil suit and because of estoppel by judgment arising out of the same suit. The employee and the deputy commissioner appeal.

In addition to filing claim under the Longshoremen's Act, Teichman, on September 27, 1956, gave notice of election to recover damages against a third person pursuant to 33 U.S.C. 933. He then filed a suit against the employer and the Stanolind Oil & Gas Company, later the Pan-American Petroleum Corporation, the owner of the tug and the supply ship, asserting unseaworthiness of the vessel and negligence. The petition in the civil action stated that the suit against the employer was brought under the Jones Act. In the original pleading, Teichman alleged that he was injured when he jumped from the tug to the supply boat (Stanolind 50), and further injured when the metal basket was lowered by the crane onto the tug (Stanolind 20). In an amended petition, however, he alleged injury from the first (the jumping) incident only, and omitted all of the allegations pertaining to the second (the basket lowering) incident. The amended petition alleged that the bumper of the supply ship was unsafe and unsuitable equipment for transferring personnel,

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A spinal fusion operation was performed in June 1957. On April 3, 1958, a further exploratory operation was made. Teichman later developed an "anxiety reaction" in addition to his physical impairments. In addition, as a result of his injury, Teichman was totally disabled from Jan. 1, 1956, at least to July 20, 1959 (the date of the decision of the Deputy Commissioner) and continuing.

No written notice was given, but the employer had knowledge of the injury, and for a period of 19 weeks made weekly payments of $35 under the Longshoremen's Act, and provided medical care.

and that the supply ship was, therefore, unseaworthy. It further alleged negligence in failing to provide a safe place to work. For its first defense employer asserted that the Longshoremen's Act provided the exclusive remedy for Teichman, since he was a driller, and not a seaman. Numerous other defenses were also asserted.

This civil action against the employer and shipowner was tried to a jury in the District Court for the Southern District of Texas. Teichman testified that his duties were primarily those of a driller on the "monkey board" of the derrick, but that in case of storm or emergency he would help take down the ramp and disconnect mud and water lines, all of which ran from the supply ship to the drilling platform. He testified that he lived on the supply ship and was furnished his meals there. He stated that he had never "signed on" as a member of the crew, that he never held any seaman's papers, and that he belonged to the ironworkers' union, and not to any seaman's union. When asked: " * * * are you a seaman?", he replied, "No, sir, I am not". Teichman testified about his jumping from the tug to the supply ship, but when he started to describe the second (the basket lowering) incident, defense counsel objected, and no testimony about that incident was received. Special interrogatories were propounded to the jury, pursuant to Rule 49 (a) F.R.C.P.

The court instructed the jury that if they answered the first question in the negative, they need not answer the others, and, in response to the first question, "Did the plaintiff, Willie J. Teichman, receive an injury on January 1, 1956 as he was boarding the vessel Stanolind 50?". the jury's verdict was: "The plaintiff did not receive such injury". In accordance with the court's instructions, the jury answered no further questions, and, since the jury

had determined that plaintiff did not receive the injury on which the amended pleading was based, judgment was entered for the defendants on June 21, 1958.

Following the employer's controversion (in September, 1958) of Teichman's claim for benefits under the Longshoremen's Act, the Deputy Commissioner held a hearing. The employer and insurance carrier conceded the employer-employee relationship, and admitted that the incidents occurred while Teichman was within the scope of his employment, but denied that he received any injury or was disabled as he claimed. Their "principal contention", however, was that Teichman was precluded by the election of the first suit and by estoppel by verdict and judgment therein from claiming and obtaining a compensation award. To support this contention, they offered the judgment, pleadings, and motions in the civil suit, and the testimony of Teichman, but little or none of the rest of the testimony given in that suit. On the merits of the compensation claim, the parties offered lay and medical testimony pertaining to the second (the basket lowering) incident.

On the question of estoppel by judgment, the deputy commissioner found that the jury had decided only one thing, namely that Teichman was not injured as a result of the first (the jumping) incident. So deciding, he accept the jury's decision on that question, but concluded that Teichman was injured as a result of the second (the basket lowering) incident, and he based his award on that injury. In the action to review the award brought by the employer and its insurance carrier, the district court *ruled that the deputy commissioner's findings were supported by substantial evidence, but held that Teichman was barred from recovering compensation under the Long-*

shoremen's Act as a result of the second injury, because he had based his civil action for the first injury on the premeise that he was a seaman, and he could not take before the deputy commissioner the inconsistent position that he was not a seaman and, therefore, within the Longshoremen's Act. Accordingly, the court entered judgment in favor of the employer and insurance carrier, enjoining enforcement of the award.

Appealing, Teichman, the deputy commissioner, and the United States are here insisting that, in rendering the judgment, the district judge entirely misconceived and misapplied the principles on which his judgment was based and attacking as wholly unsound the district judge's finding and conclusion that Teichman's suit against his employer in the prior civil action under the Jones Act constituted an election or estoppel, which precluded Teichman from receiving compensation under the Longshoremen's Act, and rendered illegal and invalidated the deputy commissioner's finding and award in Teichman's favor under the Longshoremen's Act.

Arguing on the issue of election that there was no inconsistency in the fact that Teichman had brought his Jones Act suit on the theory that he was a seaman and that his right to recover under the Longshoremen's Act was based upon his being a maritime worker and not a member of a crew of a vessel, appellants cite many cases in support. On the issue of estoppel by judgment, the appellants, pointing out that the recovery sought and denied in the damage suit was for a different injury from that claimed and found in the Workmen's Compensation suit and that the jury's finding, that the injury sued for in the damage suit was not sustained, could not, under the commissioner's finding, that another and wholly different injury which was not adjudicated in the prior suit had

caused the injuries for which compensation was claimed, constitute an estoppel by judgment.

Citing many cases in support of their position, appellants argue with conviction: that the case chiefly relied on by the district judge, *Scarano v. Central R. R. Co.*, 203 F (2) 510, was decided on very different facts and is not at all in point; and that nothing in it supports the contention here made.

After full consideration and without undertaking a discussion and analysis of the many cases cited on both sides, we think it sufficient to say that we agree with appellants that the decision of the district judge was wrongly based and may not stand. We particularly agree with appellants that the claim for compensation under the Longshoremen's Act is not barred by the prior suit. Cf. *Massachusetts Bonding Co. v. Lauson*, 149 F (2) 853 (5 Cir.); *Newport News Shipbuilding Co. v. O'Hearne*, 192 F (2) 968 (4 Cir.); and *Western Shipbuilding Co. v. O'Leary*, 198 F (2) 409 (9 Cir.). It has been consistently held both in the Supreme Court and in the circuit courts that an unsuccessful action in a Jones Act case is not inconsistent with and does not prevent a subsequent act for compensation. *Davis v. Dept.*, 317 U.S. 249; *Norton v. Warner Co.*, 321 U.S. 565. Indeed by statute, 33 U.S.C. 913(b), the congress has provided that if an employee elects to recover damage against a third person and the amount of that recovery is less than that to which he was entitled under the Longshoremen's Act, the employer is obliged to pay the difference. Cf. So. *Chicago Coal and Dock Co. v. Bassett*, 309 U.S. 251; *Pac. Emp. v. Philsbury*, 130 F. (2) 21; *Kibadeau v. Standard Dredging Co.*, 81 F (2) 670.

On the claim of the appellees that the verdict of the jury, finding that plaintiff did not receive an injury, constituted an estoppel against his claim in the compensation

suit that he did, appellants point out that the record in the civil suit shows that, while two injuries were claimed in the original petition, only one was claimed in the amended petition and submitted to the jury, and that the jury found against that specific injury and that alone. It will not, therefore, do for the appellees, in the face of the specific question submitted to the jury and its as specific answer to that question, and that alone, to argue, as they do here, that the real question submitted to, and determined by, the jury against plaintiff was whether plaintiff's injuries had been suffered by him prior to the incidents referred to in the suit, and he was, therefore, estopped from claiming the injury as claimed by him in the compensation suit.

In conclusion, while we are of the opinion that, speaking generally, the applicable statutes and decisions make it clear that a claim of inconsistency between an unsuccessful suit under the Jones Act and a later action for compensation cannot be asserted in the compensation suit as an election preventing a compensation award, the record in this case makes it completely clear: that certainly here no such inconsistency in fact or in law exists; that no election occurred; there was no estoppel; and that the judgment appealed from may not stand. The judgment is, therefore, REVERSED and the cause REMANDED with directions to deny the injunction.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By GILBERT GANUCHEAU
Deputy
New Orleans, Louisiana, Oct. 4, 1961

(Seal)